

STATE OF MICHIGAN
COURT OF APPEALS

DAVID L. MARTINEZ and CHRIS MARTINEZ,

Plaintiffs-Appellants,

v

KEN MUELLER,

Defendant-Appellee.

UNPUBLISHED

April 27, 2006

No. 266200

Oakland Circuit Court

LC No. 04-059128-CD

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ

PER CURIAM.

Plaintiffs¹ appeal as of right the trial court’s order granting summary disposition in favor of defendant, Ken Mueller. We affirm.

Plaintiff was terminated by his employer, General Motors (GM), for violating the corporation’s published guidelines for appropriate email usage. Plaintiff claimed he had not been personally involved in inappropriate email use, and asserted that defendant had used plaintiff’s email account to send inappropriate email messages and their attachments to defendant’s personal email account. Plaintiff brought a claim against defendant based in part on tortious interference with contract. Defendant filed a motion for summary disposition and the trial court granted it.

Plaintiff argues that the trial court erred in granting summary disposition to defendant. We disagree. Because the trial court considered evidence outside the pleadings, we review the decision using the standard for MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). We review de novo a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), considering “the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Rose v Nat’l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002).

¹ We will use the singular “plaintiff” to refer to David L. Martinez in this opinion. Although Chris Martinez is also named as a plaintiff, her loss of consortium claim is not relevant to this appeal.

Summary disposition is appropriately granted, “if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

The elements of a tortious interference with a contract claim are: “(1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant.” *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005). Additionally, the plaintiff must allege “the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.” *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 382; 689 NW2d 145 (2004).

In moving for summary disposition, defendant had the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Defendant asserted that plaintiff had failed to show that defendant intentionally performed any per se wrongful act or a lawful act with malice. The burden then shifted to plaintiff to establish that a genuine issue of material fact existed. *Id.*

Plaintiff submitted the affidavit of a co-worker, Raleigh Doust, which stated that defendant had told Doust that defendant had forwarded the inappropriate email attachments from plaintiff’s email address. Plaintiff also submitted his own deposition testimony that another co-worker, Kevin Morrison, had told plaintiff that defendant had made a similar disclosure. However, defendant in his deposition denied he had told Doust he had used plaintiff’s email account. And Kevin Morrison was not deposed, so there is no support for plaintiff’s claim as to what Morrison said to him about defendant. Although it is a violation of GM’s policy for an employee to share his or her login ID or password with another employee, plaintiff stated in his deposition that defendant had plaintiff’s password because defendant helped plaintiff with computer “stuff.” Defendant denied he had ever logged on with plaintiff’s ID and password.

Plaintiff simply produced no evidence that defendant intentionally committed a per se wrongful act, or acted with malice, for the purpose of interfering with plaintiff’s business relationship with their mutual employer, GM. Even viewing the evidence offered in the light most favorable to plaintiff, as the non-moving party, the required elements of the claim asserted are not supported. Plaintiff has failed to present any genuine issue of material fact that could lead a reasonable trier of fact to conclude that defendant committed a malicious or intentionally wrongful act that caused plaintiff to be discharged by his employer. Accordingly, we conclude that plaintiff failed to present evidence supporting the claim of tortious interference with a contract.

The trial court granted summary disposition in part because it concluded that plaintiff’s status as an at-will employee precluded recovery for his tortious interference claim. Generally, employment relationships are terminable at the will of either party. *Lyle v Malady*, 458 Mich 153, 163; 579 NW2d 906 (1998). There are several ways a plaintiff can prove an exception to this general rule:

- (1) proof of a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a

contractual provision, implied at law, where an employer's policies and procedures instill a legitimate expectation of job security in the employee. [*Id.* at 164 (footnotes and internal quotations omitted).]

The GM policy handbook states that salaried employees are employed on a calendar "month-to-month basis," and that the month-to-month employment relationship may not be "altered, amended, or extended by any employee, representative or agent of GM."

Plaintiff presented no evidence of a contractual provision or other express agreement affecting the month-to-month employment relationship. Plaintiff admitted that he was never told anything about the expected duration of his job at GM, nor that he could only be fired for good cause. Plaintiff claimed he assumed a "good cause" arrangement based on "normal thinking." Plaintiff has therefore failed to overcome the presumption that plaintiff had an at-will employment relationship with GM. *See Lytle, supra*, pp 163-164.

However, a plaintiff's status as an at-will employee does not automatically limit his recovery to nominal damages. *Health Call of Detroit, supra*, p 86 (overruling *Environair, Inc v Steelcase, Inc*, 190 Mich App 289; 475 NW2d 366 (1991), "to the extent that *Environair* is read as limiting recovery to nominal damages as a matter of law in all cases in which there is a request for damages arising out of or related to the termination of at-will contracts such as those involved" in *Health Call* and *Environair*). Accordingly, the trial court granted summary disposition for the wrong reason. However, a "trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Plaintiff also argues that plaintiff may not be discharged from at-will employment on the basis of his exercise of his constitutional right of free speech. However, plaintiff fails to articulate how any of plaintiff's actions constitute an exercise of free speech, and "[i]t is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). The cases cited by plaintiffs are inapplicable because they involve retaliatory discharge. *Hrab v Hayes-Albion Corp*, 103 Mich App 90, 94; 302 NW2d 606 (1981); *Sventko v Kroger Co*, 69 Mich App 644, 646-647; 245 NW2d 151 (1976).

Plaintiff argues that defendant's conduct constitutes tortious interference with a contract because it violates the fraudulent access to computers, computer systems, and computer networks act, MCL 752.791 *et seq.*² We disagree. Because the trial court did not address this argument, it has not been preserved for appellate review. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). We therefore review it for plain error. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was

² Specifically, plaintiff cites MCL 752.794, 752.795, and 752.796.

plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), applying *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Plaintiff failed to present any evidence that defendant accessed plaintiff’s email without plaintiff’s authorization, which is a requisite element of each of the sections cited by plaintiff. Further, there is no evidence that defendant committed, attempted to commit, or intended to commit a crime. Accordingly, the trial court did not commit plain error in granting summary disposition of plaintiff’s tortious interference with a contract claims.

It also appears that plaintiff argues that the trial court erred in granting summary disposition of its fraudulent misrepresentation claim in relation to the argument about the fraudulent access to computers, computer systems, and computer networks act. We find plaintiff’s fraudulent misrepresentation claim to be misplaced because plaintiff never argued that defendant made a material misrepresentation to plaintiff or that plaintiff acted in reliance on any misrepresentation made by defendant. See *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). Rather, plaintiff argued that defendant made a material misrepresentation to GM and that GM, a third party, acted upon the misrepresentation in discharging plaintiff. Therefore, we conclude that the trial court properly granted summary disposition of plaintiff’s tortious interference and fraudulent misrepresentation claims on these grounds.

In the argument section of its brief on appeal, plaintiff also argues that the trial court erred in dismissing its discrimination and emotional distress claims. However, these issues are not properly before this Court because they were not included in the “statement of questions involved” section of plaintiff’s brief on appeal as required by MCR 7.212(C)(5). Therefore, they are deemed waived and not subject to appellate review. MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald